

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

KATHLEEN SULLIVAN,

Petitioner,

v.

CLAY COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

EEOC Case No. 15D200800786

FCHR Case No. 2008-02165

DOAH Case No. 09-0033

FCHR Order No. 09-103

FILED  
2009 NOV 25 A 10:36  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

**FINAL ORDER DISMISSING PETITION FOR  
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Kathleen Sullivan filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2007), alleging that Respondent Clay County Board of Commissioners committed unlawful employment practices on the basis of Petitioner's disability by denying Petitioner a reasonable accommodation and by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on December 3, 2008, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

The parties filed a joint motion for summary hearing, pursuant to Section 120.574, Florida Statutes (2007), which was granted by Administrative Law Judge Suzanne F. Hood.

An evidentiary hearing was held in Green Cove Springs, Florida, on March 4, 2009, before Judge Hood.

Pursuant to Section 120.574, Florida Statutes (2007), Judge Hood issued an Amended Summary Final Order, dated June 12, 2009, dismissing the Petition for Relief with prejudice, and setting out the right of the parties to appeal the order to a District Court of Appeal.

Upon issuance of the Amended Summary Final Order, the Commission, sua sponte, issued an "Order Finding Void 'Amended Summary Final Order'; Designating 'Amended Summary Final Order' as a 'Recommended Order'; and Setting Time Frames for the Filing of Exceptions and the Creation of the Record Before the Commission," dated September 9, 2009, and designated as FCHR Order No. 09-079. This order concluded that Section 120.574, Florida Statutes (2007) did not apply to cases brought pursuant to the Florida Civil Rights Act of 1992, that the Administrative Law Judge's Amended Summary Final Order was void as a "final order,"

but could appropriately serve as the Recommended Order in this matter, and established time frames for the parties to file exceptions to the newly designated Recommended Order and for the establishment of the record before the Commission.

The time frames having expired for the filing of exceptions and the establishment of the record, the Commission panel designated below considered the record of this matter and determined the action to be taken on the former Amended Summary Final Order, now the pending Recommended Order.

#### Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

#### Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

#### Petitioner's Exceptions

In response to the issuance of FCHR Order No. 09-079, Petitioner filed a document entitled, "Response to Recommended Order No. 09-079," received by the Commission on or about September 16, 2009.

The document essentially requests that the Commission decline taking further action in this matter.

In FCHR Order No. 09-079, the Commission concluded that the Amended Summary Final Order issued by the Administrative Law Judge was void, but that it was an appropriate Recommended Order from which the Commission could take the "final agency action" the Florida Civil Rights Act of 1992 directs the Commission to take in cases brought pursuant to that statute.

Consequently, since the Commission is directed by statute to take final agency action on Recommended Orders (see Section 760.11(7), Florida Statutes (2007)), Petitioner's request is denied.

#### Respondent's Exceptions

In response to the issuance of FCHR Order No. 09-079, Respondent filed exceptions to the pending Recommended Order in a document entitled, "Respondent's Exceptions to Recommended Order," received by the Commission on September 24, 2009.

While the document does not except to the ultimate recommendation of the Recommended Order, it does except to some of the underlying conclusions of law made by the Administrative Law Judge.

Specifically, Respondent: (1) excepts to the definition of disability cited by the Administrative Law Judge in Recommended Order, paragraph 32; (2) excepts to the Administrative Law Judge's conclusion that Petitioner was regarded as disabled by Respondent, set out in Recommended Order, paragraph 33; and (3) excepts to the Administrative Law Judge's conclusion that Petitioner was a "qualified" individual with a disability, set out in Recommended Order, paragraph 34.

With regard to Respondent's exception to Recommended Order, paragraph 32, to the extent that the Administrative Law Judge committed error in the citation of the definition of "disability," this error appears harmless since both the definition cited and the definition argued to be appropriate by Respondent include "being regarded as having such an impairment" as part of the definition of disability.

Respondent's exception to Recommended Order, paragraph 32, is rejected.

With regard to Respondent's exceptions to Recommended Order, paragraphs 33 and 34, both of these paragraphs contain elements of findings of fact drawn by the Administrative Law Judge, through inference, from the evidence presented.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

Respondent's exceptions to Recommended Order, paragraphs 33 and 34, are rejected.

#### Dismissal

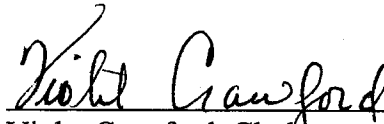
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 24<sup>th</sup> day of November, 2009.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Mario M. Valle, Panel Chairperson;  
Commissioner Gayle Cannon; and  
Commissioner Patty Ball Thomas

Filed this 24<sup>th</sup> day of November, 2009,  
in Tallahassee, Florida.



Violet Crawford, Clerk  
Commission on Human Relations  
2009 Apalachee Parkway, Suite 200  
Tallahassee, FL 32301  
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

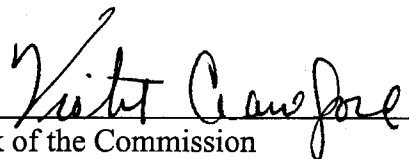
Kathleen Sullivan  
c/o Gaither L. Saunders, Jr., Qual. Rep.  
1640B Vineland Circle  
Fleming Island, FL 32003

Clay County Board of Commissioners  
c/o Margaret P. Zabijaka, Esq.  
c/o Lori K. Mans, Esq.  
Constangy, Brooks & Smith, LLP  
200 West Forsyth Street, Suite 1700  
Jacksonville, FL 32202

Suzanne F. Hood, Administrative Law Judge, DOAH

Lawrence Kranert, FCHR Chief Legal Counsel and Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 24<sup>th</sup> day of November, 2009.

By:   
Clerk of the Commission  
Florida Commission on Human Relations

# CONSTANGY

## BROOKS & SMITH, LLP

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September 24, 2009

**VIA FACSIMILE 850-488-5291**  
**U.S. MAIL**

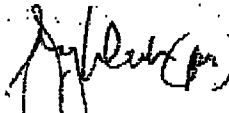
Ms. Denise Crawford  
Clerk of Commission  
Florida Commission on Human Relations  
2009 Apalachee Parkway  
Suite 200, Oakland Bldg.  
Tallahassee, FL 32301

**Re: Kathleen Sullivan v. Clay County Board of County Commissioners**  
**FCHR No.: 2008-02165**

Dear Ms. Crawford:

Please find attached Respondent's Exceptions to Recommended Order in the above-referenced action.

Sincerely,



Lori K. Mans

LKM/slt  
Enclosure

cc: **Kyia Lynn Robinson (w/encl.)**  
**c/o Gaither L. Saunders**

**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

**KATHLEEN SULLIVAN,**

**Petitioner,**

**FCHR Case No.: 2008-02165**

**DOAH Case No.: 09-0033**

**v.**

**CLAY COUNTY BOARD OF COMMISSIONERS,**

**Respondent:**

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**RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER<sup>1</sup>**

COMES NOW Respondent, Clay County Board of County Commissioners, ("Respondent"), by and through its undersigned counsel, and files its Exceptions to Recommended Order as follows:

**I. Background**

1. Petitioner, Kathleen Sullivan ("Petitioner"), filed a Petition for Relief against Respondent, seeking redress for alleged disability discrimination pursuant to the Florida Civil Rights Act ("FCRA"), Sections 760.01-11, Florida Statutes. Specifically, Petitioner claimed that Respondent discriminated against her because of a disability (in Petitioner's case, cancer) and/or failed to reasonably accommodate Petitioner when it terminated Petitioner's employment as a full-time library clerk.

2. On June 12, 2009, after an evidentiary hearing which took place on March 4, 2009, Administrative Law Judge Hood issued an Amended Summary Final Order dismissing the

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<sup>1</sup> Sadly, on September 15, 2009, Respondent learned that Petitioner, Kathleen Sullivan passed away on September 3, 2009. Based upon documents that were filed with the First District Court of Appeal, it is Respondent's understanding that her daughter, Kyia Lynn Robinson, is continuing to pursue this matter. Further, Ms. Robinson has asked that Gaither L. Saunders, Jr., the qualified representative, be permitted to file routine documents, briefs and other general matters related to this case.

Petition for Relief with prejudice because Petitioner failed to prove a claim of disability discrimination under the FCRA. Judge Hood's decision took the form of a Summary Final Order because the parties had previously stipulated, pursuant to Section 120.574, Florida Statutes, to a summary hearing process in which Judge Hood's decision would constitute final agency action regarding Petitioner's claims.

3. On September 9, 2009, the Commission issued its Order Finding Void "Amended Summary Final Order," Designating "Amended Summary Final Order" As a "Recommended Order," and Setting Time Frames for the Filing of Exceptions and the Creation of the Record Before the Commission. The Commission's Order found that the summary hearing option in Section 120.574, Florida Statutes, was inapplicable to claims under the FCRA. Accordingly, the Commission determined that Judge Hood's Amended Summary Final Order would be treated as a Recommended Order. The Commission ordered that the parties file their exceptions to the Recommended Order within fifteen (15) days of the Commission's Order.

4. Respondent agrees with the ultimate conclusion of the Recommended Order, in that Petitioner did not prove a claim of disability discrimination under the FCRA. However, Respondent takes exception to some of the preliminary conclusions of law determined by Judge Hood in Petitioner's favor. Respondent's Exceptions, with explanation and supporting citations to authority, are set forth below.<sup>2</sup>

## **II. Exceptions**

**A. Paragraph 32 of the Recommended Order.** In this Paragraph, Judge Hood sets forth the definition of "disability" in 42 U.S.C. § 12102 of the Americans with Disabilities Act.

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<sup>2</sup> Respondent respectfully disagrees with the Commission's determination that the summary hearing procedure in Section 120.574, Florida Statutes, is not applicable to claims for relief under the FCRA. Therefore, by filing its Exceptions, Respondent does not waive the right to assert in a subsequent proceeding that the parties' stipulation to a summary hearing was valid.



("ADA").<sup>3</sup> However, the version of § 12102 cited by Judge Hood is the newly amended version of the provision pursuant to the ADA Amendments Act of 2008, effective January 1, 2009. See Pub. L. 110-325, 122 Stat. 3553 (2008). This is in error, as the events that are the subject of Petitioner's claims occurred, at the latest, in May 2008 when Respondent informed Petitioner that her employment would be terminated. See Recommended Order at Par. 12. As numerous courts have recognized, and as Judge Hood herself recognizes in Paragraph 29 of the Recommended Order, the ADA amendments do not apply retroactively to conduct that occurred prior to the January 1, 2009 effective date. See Fikes v. Wal-Mart, Inc., 2009 WL 961774, at \*2 (11th Cir. 2009); Garavito v. City of Tampa, 2009 WL 2135068, at \*6 (M.D. Fla. 2009); Milholland v. Sumner County Bd. of Educ., 2009 WL 1884376, at \*3 (6th Cir. 2009); EEOC v. Agro Distribution, LLC, 555 F. 3d 462, 469 n.8 (5th Cir. 2009); Kiesewetter v. Caterpillar, Inc., 2008 WL 4523595, \*1 (7th Cir. 2008). Accordingly, the controlling definition of "disability" under the ADA in the present case is the pre-amendment version, which states:

- (2) **DISABILITY.**--The term "disability" means, with respect to an individual--
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
  - (B) a record of such an impairment; or
  - (C) being regarded as having such an impairment.

See 42 U.S.C. § 12102(2) (2008); Pub. L. 101-336, 104 Stat. 327 (1990).

**B. Paragraph 33 of the Recommended Order.** Judge Hood concluded that Petitioner satisfied the first element of the prima facie case for a claim of disability discrimination because she proved that Respondent regarded her as disabled. Specifically, Judge Hood reasoned:

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<sup>3</sup> As noted by Judge Hood in Paragraph 28 of the Recommended Order, claims under the FCRA are construed in a like manner as claims brought under the ADA. See, e.g., Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 647 (Fla. 5th DCA 1997).

The greater weight of the evidence indicates that Respondent believed Petitioner's cancer was incurable and that she would not be able to work in the foreseeable future, if ever. Therefore, Petitioner established the first prong of her prima facie case because Respondent perceived her as having a disability. See 42 U.S.C. § 12102(1)(c).

Recommended Order at Par. 33 (citation in original). This conclusion is incorrect for two reasons. First, as noted earlier, Judge Hood utilized (and cited to) the newly amended definition of "disability" in 42 U.S.C. § 12102(1)(c), which does not apply to this case.

Second, under the pre-amendment version of the ADA's definition of "disability," a person can only be "regarded as" disabled if the employer regarded the person as being substantially limited in a major life activity. See 42 U.S.C. § 12102(2) (2008); Pub. L. 101-336, 104 Stat. 327 (1990). With respect to the major life activity of working,<sup>4</sup> an employer regards a person as substantially limited if it regards the person as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." Butler v. Greif Bros. Service Corp., 2007 WL 1244206, at \*3 (11th Cir. 2007)(quoting 29 C.F.R. § 1630.2(f)(3)(i)).

In the present case, there is no evidence in the record that Respondent considered Petitioner's ability to perform any job other than the one she held, much less that she was significantly restricted in the ability to perform a class of jobs or broad range of jobs in various classes. See Butler, 2007 WL 1244206 at \*3 (holding that machinist-electrician was not regarded as being disabled by former employer where, at most, former employer perceived machinist-electrician to be unable to perform only the job of machinist-electrician); Carruthers v. BSA Advertising, Inc., 357 F.3d 1213, 1217 (11th Cir. 2004)(holding that art director was not perceived as disabled where there was no evidence that employer regarded art director's

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<sup>4</sup> There is no record evidence showing that any other major life activity was implicated by Respondent's decision to terminate Plaintiff's employment.

condition as impairing major life activity of working, as opposed to impairing art director's specific job); Collado v. United Parcel Service, 419 F.3d 1143, 1157 (11th Cir. 2005)(holding that plaintiff was not "regarded as" disabled by UPS where "[t]here is no evidence that UPS regarded [plaintiff] as substantially limited from any job other than that of full-time driver at UPS, much less from a class or broad range of jobs."). See also Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1230 (11th Cir. 1999)(holding that plaintiff was not "regarded as" disabled where employer merely relied on plaintiff's significant attendance issues in making its employment decisions).. Accordingly, Judge Hood's conclusion that Petitioner was regarded as disabled is not supported by the evidence.

**C. Paragraph 34 of the Recommended Order.** In addition to finding that Petitioner was regarded as disabled under the FCRA, Judge Hood also found, incorrectly, that Petitioner was a "qualified" individual with a disability. An individual with a disability is "qualified" where she can perform the essential functions of her position with or without a reasonable accommodation. See 42 U.S.C. § 12111(8) (2008). Judge Hood based this conclusion on two points: (1) that Petitioner had testified (in direct contradiction to her written statements) that she was able to return to work in mid-May 2008; and (2) that Respondent had not discussed a possible reasonable accommodation for Petitioner.

Judge Hood's conclusion on this point is erroneous, as it cannot be concluded from the record evidence that Petitioner was "qualified" under 42 U.S.C. § 12111(8). Whether an individual with a disability is "qualified" is analyzed at the time of the adverse action in question. See Rocky v. Columbia Lawnwood Regional Medical Ctr., 54 F. Supp. 2d 1159, 1166 (S.D. Fla. 1999)(holding that an ADA plaintiff may establish a prima facie case of discrimination where, *inter alia*, the plaintiff shows that she was "qualified for the job at the time of the adverse

employment action.”). See also Pritchard v. Southern Co. Serv., 92 F.3d 1130, 1133 (11th Cir. 1996) (noting that the relevant question in a disability discrimination case is whether employee had the claimed impairment “when she was terminated”) and Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 884 (6th Cir. 1996)(stating that to prove disability discrimination a plaintiff “must first establish as part of her prima facie case that she was a ‘qualified individual with disability’ at the time of the discriminatory act”)(emphasis in original).

In the present case, Respondent determined that Petitioner’s employment would be terminated approximately a week prior to the termination letter sent to Petitioner, which was dated May 5, 2008. (Tr. 24:24-25:10). Given this fact, Petitioner’s assertion that she was able to return to work in “mid-May” does not support a finding that she was able to perform the essential functions of her position at the time the determination was made to terminate her employment in late April or early May 2008. Further, Petitioner provided no record evidence to support her bare assertion that she was able to return to work. Indeed, as noted by Judge Hood, Petitioner’s assertion is clearly contradicted by her written statements to the contrary. In her letter to Respondent dated June 10, 2008, Petitioner claimed that performance of the essential functions of her position would be a direct threat to her health. (Tr. 123:1-124:14).

Plaintiff also applied for and received short term disability benefits, which is indicative of her inability to perform the essential functions of her position. Petitioner testified that if she is able to return to work, she is no longer able to receive these benefits. (Tr. 155:15-157:15). As several courts have noted, it is inconsistent for an employee to receive disability benefits and at the same time claim that he or she is able to perform the essential functions of the job. See Harden v. Delta Air Lines, Inc., 900 F. Supp. 493, 497 (S.D. Ga. 1995) (“finding it incredible that a plaintiff would claim that he was discriminated against by his employer for failing to make

reasonable accommodations while representing to various entities that he was unable to work"); Cline v. Home Quality Management, Inc., 2004 WL 746291 at \*3 (S.D. Fla. 2004) (noting plaintiff's short term disability benefits in determining that he was not a qualified individual with a disability because he could not be present to work).

Judge Hood also erroneously analyzed whether Petitioner was "qualified" by taking into account whether Petitioner and Respondent had discussions about reasonable accommodations. At the outset, it should be noted that a plaintiff asserting a failure to accommodate must first show that he or she requested a reasonable accommodation. Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999)(holding that failure-to-accommodate claim under the ADA failed as a matter of law where the plaintiff "never requested a reasonable accommodation."). In the present case, the only accommodation requested by Plaintiff was an indefinite leave of absence, which has been held to be clearly unreasonable. See Myers v. Hose, 50 F.3d 278 (11th Cir. 1995)(holding that reasonable accommodation does not require employer to wait indefinitely for medical conditions to be corrected); Wood v. Green, 323 F.3d 1309 (11th Cir. 2003) (an employer did not violate the ADA by "refusing to grant [an employee] a period of time in which to cure his disabilities where the employee sets no temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions."). In any event, this issue has nothing to do with whether Petitioner produced sufficient evidence at the hearing to show that she could perform the essential functions of her position at the time she was terminated. As the record demonstrates, there is no evidence that Petitioner was able to perform the essential functions of her position at the time of her termination. Based on the foregoing, Judge Hood's conclusion that Petitioner proved she was a "qualified" individual with a disability is erroneous and must be reversed.

### III. Conclusion

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that its Exceptions to the Recommended Order be accepted, and that the Recommended Order is otherwise adopted and affirmed by the Commission.

DATED this 24th day of September, 2009.

Respectfully submitted,

CONSTANGY, BROOKS & SMITH, LLP  
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By: Lori K. Mans  
Margaret P. Zabijaka  
Florida Bar No. 0119880  
Lori K. Mans  
Florida Bar No. 0012024

Attorneys for Respondent,  
Clay County Board of County Commissioners

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Exceptions to Recommended Order has been served this 24th day of September, 2009, via first class United States mail on the following:

Kyia Lynn Robinson, daughter  
of Kathleen Sullivan  
c/o Gaither Logan Saunders, Jr.  
1640 B Vineland Circle  
Fleming Island, FL 32003

Lori K. Mans  
Attorney